Supreme Court, U.S.
FILED
JUL 25 1996
CLERK

No. 95-1913

In The

Supreme Court of the United States

October Term, 1995

THIOKOL CORPORATION, et al.,

Petitioners,

vs.

REVENUE DIVISION, DEPARTMENT OF TREASURY, STATE OF MICHIGAN; DOUGLAS B. ROBERTS, in his official capacity as Treasurer of the State of Michigan; and THOMAS M. HOATLIN, in his official capacity as Commissioner of Revenue of the State of Michigan,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF FOR PETITIONERS

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July 24, 1996

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QUESTIONS PRESENTED

I. Should this Court grant certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit which allows the State of Michigan to impose a state tax obligation on employers measured by reference to the amount of the employer's payments for health and life insurance acquired for its employees and contributions made to retirement plans established for the benefit of its employees which are subject to the provisions of the Employee Retirement Income Security Act of 1974 ("ERISA") despite the ERISA preemption clause prohibition against the enactment of "any state tax law relating to employee benefit plans" covered by ERISA?

II. Should this Court grant certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit that a 90-day statute of limitations limiting the right of a Michigan taxpayer to contest a Michigan tax on the basis that the tax violates a federal statute such as ERISA or a constitutional provision, when a four-year statute of limitations applies to the right to contest the tax on any other basis, is not preempted by ERISA?

III. Should this Court grant certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit that a federal court lacks jurisdiction to consider a declaratory judgment action requesting as relief a determination that a 90 day statute of limitations on the right of a Michigan taxpayer to contest a Michigan tax on the basis that the tax violates a federal statute such as ERISA or a constitutional provision, violates the due process and/or equal protection clauses of the United States Constitution, in light of 28 U.S.C. § 1341?

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REPLY BRIEF FOR PETITIONERS

Respondents have filed a Brief In Opposition to the Petition for Writ of Certiorari currently pending consideration by this Honorable Court and a supplemental brief for Respondents dated July, 1996 [sic]. Pursuant to S. Ct. Rule 15.6, Petitioners file this Reply Brief. The purposes for which this Reply Brief is submitted are as follows:

1. To correct and clarify Respondents' overly broad statement of the ERISA preemption issue involved in the pending Petition; and
2. To impeach the credibility of certain factual representations made by Respondents in their Brief In Opposition to this Court through reference back to Respondents' pleadings filed in the Federal District Courts below; and
3. To address the applicability of the decision of this Court in *Trinova Corp. v. Michigan Dept. of Treasury*, 498 U.S. 358; 112 L.Ed.2d 884; 111 S.Ct. 818 (1991) cited and argued throughout the Brief For Respondents In Opposition; and
4. To address the national significance of this case challenged by the Brief in Opposition.

ARGUMENT

I.

FAIR PRESENTATION OF THE QUESTION.

A comparison of the Statement Of Questions Presented from page i of the Petition for Writ of Certiorari and the Brief For Respondents In Opposition reveals that Respondents overstate both the preemption question presented by this case and the relief sought by Petitioners. The question is not, as stated by Respondent, "Whether ERISA § 514(a) pre-empts the Michigan SBT" since such a statement implies that Petitioners wish this Court on review to strike down the entirety of the SBT. That is not the truth. The truth is that the question presented and the relief sought by Petitioners is a determination that a portion of one subsection [Mich. Comp. Laws Ann. § 208.4(3)] of the Single Business Tax

Act ("SBTA") is preempted by § 514(a) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1144(a). *See*, Petition, pp. 2-6 and fn 8. An affirmance by this Court of the *Akzo* District Court decision in favor of Petitioners below will result in a finding of preemption of only one portion of one subsection of one section of the SBTA and not the entirety of the state statute.

II.

RESPONDENTS' REVERSAL OF FIELD.

At page 18 of its Brief In Opposition, Respondents contradict their pleadings filed in the *Akzo* District Court proceeding below by asserting " . . . the fact that there is no direct correlation between contributions to employee benefit plans and SBT liability. To the extent that sums are retained as profit or otherwise consumed in the economic endeavor of the taxpayer, the tax liability may not be impacted at all by a decision to lower contributions to a qualified plan." In the complaint filed in the District Court below in *Akzo, et al.*, Petitioners alleged at ¶ 26 as follows:

> 26. Application of the SBTA so as to require each plaintiff to include in its single business tax base its contributions to and the costs which it incurs in sponsoring and providing employee benefit plans has and will have the effect of increasing each plaintiff's single business tax liability.

Here is what Respondents said then:

> 26. **Defendants admit the allegations set forth at ¶ 26 of the Complaint**. By way of further answer, Defendants state that Michigan's single business tax liability is based upon the addition method of determining value-added. This method arrives at a tax base by adding various components, including a sub-component – compensation. Under the subtraction method of determining value-added, there is no sub-component – compensation. The addition and subtraction methods are conceptually equivalent methods of calculating value-added. *Trinova v. Department of Treasury*, 498 U.S. ___; 111 S. Ct 818; 112 L.Ed.2d 884 (1991). **While it is true that including contributions and costs of**

> **employee benefit plans increases the single business tax payable, this is an irrelevant inquiry.** To exclude these costs and contributions reduces the tax inappropriately in that it excludes an element of tax base which is an essential component of a value-added tax. [Bold highlighting added]

This candid answer filed by Respondents below in July of 1993 states the obvious, and Petitioners would not repeat it but for Respondents' failure to own up to this portion of its District Court pleading in the brief filed by Respondents before this Honorable Court.

This contradiction of Respondent by Respondent is also unsupported by any evidence in the records assembled below, and is in fact contrary to the evidence assembled. On November 12, 1993, the parties took the deposition of John C. Hedley, Vice President of Human Resources for Petitioner Morton International. He testified concerning the SBTA impact on decisions Morton makes with regard to providing employee benefits to their employees throughout the nation. Asked to explain the relationship of the SBTA burden and the level of benefits which Morton determines to provide to its employees, Mr. Hedley testified:

> A . . . [T]his [SBT liability] is a very definite cost and – any cost is important to us in determining what we're going to do with our benefit plans currently and in the future. [App. 86]
>
> A And, therefore, to the extent that costs go up or are higher and we want to control those costs, we can change the level of benefits one way or the other. [App. 88]

Asked to explain actions which Morton has taken in response to an increase in costs of its labor contract, including employee benefit levels, Mr. Hedley elaborated:

> A It could have a variety of impacts. I mean, that happens to be a salt plant, of which we have a great number in the United States. The benefit levels at that particular plant over a 25-year period of time or a 30-year period of time that I've been involved with it have been higher than some of the other plants. As a consequence, the marketing area that is served by that particular plant has steadily

shrunk . . . and those benefit costs are just one of the factors of the hired labor costs in that particular plant. [App. 89]

As to the connection between the cost of providing employee benefits and state taxation imposed with reference to the funding employer payments, Mr. Hedley said:

A . . . and that's why controlling the costs of those plans becomes very, very important to us because every time we find ourselves in the position of having to control these costs by making a reduction in the benefit, we think that we denigrate the attractiveness of employment with the company . . . all in effort to save a little bit of money in terms of the administrative costs of the plan so that we could maximize the actual benefits to the employee rather than the administrative costs, and, I cannot help but say, such as taxes. [App. 95]

Mr. Hedley testified concerning the tangible impact the SBTA has upon employee benefits Morton provides to its employees nationwide:

A . . . one of the things that's particularly bothersome is that, as I understand the calculation of this tax cost, it can disproportionately affect us as a multistate employer with employees throughout the United States based upon the amount of business that we do in Michigan, where we don't – where have a disproportionately lower number of employees as opposed to where we might have them in other parts of the country.

Q (By Assistant Attorney General Greenberg) So the single business tax, as you perceive it, appears to be a little disproportionate in its ultimate numerical impact?

A Yes. I have currently 3,500 going on 4,000 employees in Utah, which is one-third of our employees. We don't do one-third of our business in Utah. And we do a smaller amount of our business in proportion in Utah and we do a greater proportion of our business in Michigan because of the population in Michigan, obviously, that our proportionate number of employees in Michigan. Therefore, the inclusion of a tax on our employee benefit

> costs in Michigan I think has a disproportionate effect on what we can do for benefits for our employees in Utah. [App. 104]

The correlation is admitted by Respondents and established in the record.

After thus contradicting its District Court pleadings, Respondent proceeds at page 18 to seek refuge in the decision of this Court in *Trinova Corp. v. Michigan Dep't of Treasury*, 398 U.S. 358; 111 L. Ed.2d 884, 905; 111 S.Ct. 818 (1991), particularly the discussion appearing at 498 U.S. 376. In that portion of its opinion, this Court said that the payment of additional compensation may or may not result in an increase in value-added. That statement does not serve to disprove the truth of Respondents' assertion below that including contributions to employee benefit plans in the SBT base increases SBT liability. Value-added may or may not increase as a result of the payment of additional employee benefits. However, there is no doubt that single business tax liability will increase as Respondent readily admitted before the District Court. Value-added is not the same as single business tax liability. SBT liability, because it is determined by adding income and expenses, including employee benefit plan contributions, increases when plan contributions increase, even though, as this Court observed in *Trinova*, value added may not increase.

Another contradiction to Respondents' position taken in its pleadings filed in the District Court below appears at page 19 of Respondents' Brief In Opposition. Respondents maintain "There is no 'reversal' of federal tax deductions for plan contributions as suggested by Petitioners. (Petition, p 2.)" At paragraph 30.b of Plaintiffs' Motion for Summary Judgment in *Thiokol* below, Petitioners alleged as follows:

> 30. The SBTA "relates to" employee benefit plans within the meaning of the preemption clause of 29 U.S.C. §§ 1144(a) and 1144(b)(5)(B)(i) for reasons that include the following: . . . (b) In calculating the tax base of a single business taxpayer, it is necessary to refer to expenses incurred, insurance premiums paid, and contributions made by each plaintiff as an employer to its employee benefit plans;

Here is what Respondents said then:

> 30.b In response to the allegations set forth in paragraph 30(b) of Plaintiffs' Motion for Summary Judgment, Defendants admit that the statutorily-prescribed calculation of the SBT base requires inclusion of contributions by Plaintiffs to their employee benefit plans. Defendants deny that this fact compels a determination that the SBT "relates to" employee benefit plans. **The purpose of this inclusion is to eliminate the deduction for contributions to employee benefit plans allowed by the Internal Revenue Code in calculating the federal corporate income tax because such a deduction is inconsistent with the determination of value-added.** The tax base is capable of being calculated by two equivalent methods, i.e., the additive or subtractive method. *Trinova*, 365, 376. Michigan's choice of the additive method does not result in the SBT "relating to" employee benefit plans. [Bold highlighting added]

The SBTA provides for state tax treatment directly the opposite of that provided under the Internal Revenue Code. Contributions to employee benefit plans are specifically excluded in calculating federal income subject to tax. Contributions to employee benefit plans are specifically included in calculating single business tax base subject to tax. The SBTA works at cross-purposes with the Internal Revenue Code, eliminating the deduction allowed for contributions to employee benefit plans in calculating the federal corporate income tax. The SBTA is apparent in its reversal of the federal income tax deduction, both by the language of § 4(3) of the SBTA, but also graphically demonstrated by the mandatory entries on lines 13 and 14 of the Single Business Tax Annual Return Form C8000 (Petitioners' App. 79).

When a case reaches the Supreme Court of the United States, it is simply too late for one party to attempt to change the facts. Litigants simply must not be allowed to adopt new positions contrary to those which they have taken in preceding stages of the same legal proceeding, and when such abandonment is apparent, it must be challenged.

III.

TRINOVA DOES NOT CONTROL THIS CASE.

In their Brief In Opposition, Respondents merely repeat much of the discussion of value-added tax ("VAT") economic theory from the *Trinova Corp. v. Mi 'igan Dep't of Treasury*, 498 U.S. 358; 112 L. Ed.2d 884; 111 S.Ct. 818 (1991) opinion as though it has dispositive application to the present case. There, the Court was faced with two questions: 1) whether the three-factor apportionment formula for the SBTA violated either the due process or commerce clauses of the U.S. Constitution, and 2) whether the SBTA discriminated against out-of-state businesses. *Trinova*, 112 L. Ed.2d at 896. By contrast, the case on petition has nothing to do with apportionment, due process, commerce clause or discrimination. Rather, the question presented here is whether a federal enactment, universally held to be the broadest ever enacted, preempts Michigan's attempt to determine tax responsibility by reference to funding contributions made by a sponsoring employer to benefit plans covered by ERISA.

In *Trinova*, the Court summarized Trinova's argument to be that because its SBT base was composed in large part of compensation and depreciation, elements which can be assigned to a geographic source, the Court *must* reject apportionment of the tax base altogether. 112 L. Ed.2d at 904. Apportionment is the process of dividing the tax base of a multistate taxpayer between several states in which it does business in order to attribute the tax base fairly among those states. Trinova argued that apportionment of a VAT base was unconstitutional. In response, Michigan argued that the SBT is a VAT, imposed upon business activity and the tax base, once amalgamated, was indivisible and its components could not be separately examined. This Court dismissed such a narrow analysis as follows:

> We reject at the outset, however, arguments by Michigan and some *amici curiae* that the Michigan SBT can be analyzed as a tax on 'business activity' [citation omitted]. The statute does not say that the SBT is a tax upon business activity, but rather that it is a 'tax of 2.35% upon the adjusted base of every person with business activity in this state which is allocated or apportioned to this state.' MCL 208.31(1) (1979)

> (emphasis added). While Michigan business activity is a threshold requirement for the tax, and value added is its measure, **labeling the single business tax a tax 'on business activity' does not permit us to forego examination of the actual tax base and apportionment provisions. 'A tax on sleeping measured by the number of shoes you have in your closet is a tax on shoes.'** Jenkins, State Taxation in Interstate Commerce, 27 Tenn L R 239, 242 (1960). 112 L.Ed.2d at 905 [Bold highlighting added]

The Court concluded that the mere fact that some tax base components could be geographically sourced did not constitutionally require Michigan to allow a taxpayer to geographically source (allocate) those items rather than include them in tax base subject to apportionment. 112 L. Ed.2d at 908. Most significantly, the holding in *Trinova* was that Trinova failed to meet its burden of proving by clear and cogent evidence that apportionment yielded a distorted result (*Id.* at 911) and that, as applied to Trinova during the tax year in issue, the SBT did not violate the due process or commerce clauses of the U.S. Constitution (*Id.* at 913).

However, the decision of this Court in *Trinova* does not authorize Michigan to enact a tax law which imposes liability by reference to contributions which a sponsoring employer makes to employee benefit plans. While there has been mostly congressional silence as to state taxing power, Congress has clearly spoken with regard to the ability of the states to legislate in relation to employee benefit plans covered by ERISA. It has expressed an intent to completely occupy the field, prohibiting states from enacting laws which make reference to a covered employee benefit plan or to establish rights or responsibilities under state law by reference to an ERISA plan. ERISA calls for preemption when a state law has a reference to or connection with a plan, including state tax laws. *Trinova* merely represents a recent application of the well-established commerce clause principle that a taxpayer bears a heavy burden in attacking a state tax apportionment scheme.

The case on Petition deals with Michigan's decision to legislate in its tax a specific reference to ERISA-covered plans, an area which Congress has told states to avoid. The bar in this area is explicit. 29 U.S.C. § 1144(b)(5)(B)(i) provides that ERISA preemption includes "any state tax law." The *Trinova* endorsement of

apportionment of the SBT base in the absence of contrary federal legislation is quite a different matter from state tax legislation which imposes tax liability by reference to contributions of covered employee benefit plans in the face of contrary federal legislation.

Despite all of Respondents' legal argumentation over the meaning of the *Trinova* case, there is only one argument upon which Respondents rely. SBT liability is admittedly determined by reference to employee benefit plan contributions. However, Respondents contend, they could have enacted a *different* tax in place of the SBT which did not contain a specific reference to employee benefit plan contributions (*i.e.*, a law of general applicability which would have no connection with covered employee benefit plans) which would have raised the same revenue, and therefore, the fact that Michigan has enacted a tax determined by reference to employee benefit plan contributions should not matter. However, the Court cannot and should not be consumed with rendering advisory opinions on hypothetical factual scenarios. It is called upon to decide the actual case and controversy presented, and what should have been and could have been are irrelevant to these proceedings. We join with Respondents, who at p. 4 of their Supplemental Brief, "acknowledge and respect the well-established judicial doctrine prohibiting advisory opinions and limiting the scope of decisions to the precise issues presented".

IV.

THE SIGNIFICANCE OF A SUPREME COURT DECISION IN THIS CASE.

Respondents' Brief In Opposition also seeks to downplay the national significance of the preemption issue involved in this case (Brief In Opposition, p 23) for the reason that Michigan is the only state in the nation which imposes a value-added tax. However, the national significance of this case goes well beyond a value-added tax since the decision of the Sixth Circuit below offers an endorsement of validity to any state or municipal revenue raising mechanism which measures tax liability in whole or in part by reference to employee benefit plan contributions. Under the analysis of the Sixth Circuit below, such an excise or privilege tax is valid so long as it is not specifically designed to effect the employee benefit plan

to which the contributions are made. The decision below thus goes well beyond the endorsement of the SBTA measurement of tax liability by reference to employee benefit plan contributions.

Secondly, even if the significance of the Sixth Circuit decision below is limited to the parties to this case, it is important to observe that the parties in *Thiokol* and *Akzo* are incorporated in ten different states of the nation and are headquartered in eleven different states of the nation. The Michigan SBTA is imposed by a heavily populated industrial midwestern state which does not exist in a vacuum. Indeed, its tax system has nationwide impact as its industries (automotive, chemicals, agriculture, consumer products) are deeply embedded in the national commerce.

Finally, Petitioners note that ERISA is a national labor law, and any decision concerning its scope and meaning has nationwide application and implications. The interstate commerce impact of the decision below is sharply focused by the testimony of Petitioner Morton's witness John C. Hedley that the Michigan tax has an effect on Morton's employees in Utah. See pp. 4-5, infra.

CONCLUSION

For all the reasons stated, Petitioners pray that this Court grant a Writ of Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted:

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